MMIC, Inc. d/b/a Marchese Metal *and* Shopmen's Local Union 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO. Cases 29–CA–10055, 29–CA–100055–2, and 29–RC–5791

30 April 1984

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 June 1983 Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, MMIC, Inc. d/b/a Marchese Metal, Ronkonkoma, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following paragraph as 2(c) and reletter the subsequent paragraphs.

"(c) Remove from its files any reference to the unlawful discharges of Francisco Casaine and Michael Teskowich and notify them in writing that this has been done and that the discharges will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

DIRECTION

It is hereby directed that the Regional Director for Region 29 shall within 10 days from the date of this decision open and count the ballots of Victor Buono, Keith Hernandez, and Francisco Casaine in Case 29–RC–5791, and prepare and serve on the parties a revised tally of ballots. If the revised tally reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a Certification of Representative. If the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election results, dismiss the petition, and vacate the proceedings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

[1] In deciding whether a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is appropriate in this case, Chairman Dotson has considered the Respondent's proffered evidence concerning subsequent changes in its work force. At the hearing the Respondent offered evidence of employee turnover following the election. The judge rejected the evidence for lack of relevancy. Chairman Doston finds employee turnover is a relevant factor in determining whether a bargaining order is warranted, and he has taken into account the Respondent's offer of proof that it hired two additional employees shortly after the election. The record therefore shows that there were seven unit employees at the time of the hearing, five of whom were eligible to vote in the 1 November 1982 election. However, having considered this factor in conjunction with all the surrounding circumstances, Chairman Dotson is unable to find any significant mitigation of the adverse impact of the Respondent's unfair labor practices on employee rights. In making this assessment, Chairman Dotson relies on the egregious nature and pervasive extent of the violations, particularly the threat to close the plant, the grants of benefits, and the discharge of two leading union adherents. Chairman Dotson also notes the small work force involved and the prominent role of the Respondent's president in the misconduct. Based on the foregoing, and in view of the Union's acquisition of majority support prior to the commencement of the Respondent's extensive misconduct, Chairman Dotson finds that a bargaining order is justified.

Member Hunter notes that while he does not necessarily concur with the position of the Second Circuit Court of Appeals regarding the relevance of turnover, even assuming that turnover is a relevant factor he agrees that a bargaining order is warranted here for the reasons set forth by the Chairman above.

Chairman Dotson does not adopt the judge's interpretation of *Gissel Packing*, supra, with respect to the issuance of nonmajority bargaining orders where outrageous and pervasive unfair labor practices have been committed.

In the absence of exceptions thereto, Chairman Dotson adopts pro forma the judge's findings that Dennis Marchese threatened employees by stating that he would close the shop if the employees had signed union cards because he could not pay the Union's rates, and that Marchese created the impression of surveillance by telling employee Dashner that he knew Dashner voted against the Union and employee Teskowich voted for it. Chairman Dotson also adopts pro forma the judge's finding that, despite the lack of a specific allegation in the complaint, the Respondent unlawfully discharged employee Casaine on 2 October 1982.

The Respondent excepts to the provision in the judge's remedy which requires that Casaine be offered reinstatement. The Respondent contends that such provision is not appropriate because Casaine declined an offer of reinstatement made by the Respondent after the close of the hearing. In view of the limited record evidence concerning the matter, we shall leave the issue of Casaine's reinstatement to the compliance phase of this proceeding.

WE WILL NOT threaten representatives of Shopmen's Local Union 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO, with bodily injury in the presence of employees.

WE WILL NOT interrogate employees concerning their membership in or activities on behalf of the Union.

WE WILL NOT threaten to close our shop if the Union is selected as the collective-bargaining representative by our employees.

WE WILL NOT threaten to discharge employees because of their membership in or activities on behalf of the Union.

WE WILL NOT coerce our employees to renounce their membership in the Union.

WE WILL NOT promise our employees various benefits, including medical coverage, wage increases, and paid vacations in order to induce them to abandon membership in the Union or cease activities on its behalf or to induce their vote in any NLRB election.

WE WILL NOT grant wage increases in order to induce our employees to abandon their membership in the Union or their activities on its behalf or to induce their favorable vote in an NLRB election.

WE WILL NOT deny our employees wage increases or other benefits previously promised to them because of their membership in or activities on behalf of the Union.

WE WILL NOT assign our employees to more arduous and less agreeable job tasks because of their membership in and activities on behalf of the Union.

WE WILL NOT discourage membership in or activities on behalf of the Union or any other labor organization by discharging employees, by assigning them more arduous work, or by otherwise discriminating against them in their hire or tenure.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of all our full-time production and maintenance employees at our Ronkonkoma, New York location, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Francisco Casaine full and immediate reinstatement to his former job or substantially equivalent position of employment, without prejudice to his seniority or to other rights and privileges previously enjoyed.

WE WILL make whole Michael Teskowich and Francisco Casaine for any loss of earnings they may have suffered by reason of the discrimination against them, with interest.

WE WILL notify Michael Teskowich and Francisco Casaine that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

WE WILL recognize and, on request, bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit described above with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement.

MMIC, INC. D/B/A MARCHESE METAL

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on March 14, 1983, in Brooklyn, New York.

On October 1, 1982,[1] Shopmen's Local Union 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO (the Union) filed a petition for an election in MMIC, Inc. d/b/a Marchese Metal (Respondent). Thereafter, pursuant to a consent election executed by Respondent, an election was held on November 1, in a unit consisting of all full-time production and maintenance employees employed by Respondent. Following the election, a tally of ballots was served upon the parties. As a result of challenged ballots, the results were not determinative.

On November 8, the Union filed objections to the conduct of the election in Case 29–RC–5791 and a charge in Case 29–CA–10055. On December 29, the Union filed a charge in Case 29–CA–10055–2. The charges alleged violations within the meaning of Section 8(a)(1), (3), and (5) of the Act.

On December 30, following an investigation of objections and challenges in Case 29–RC–5791 and an investigation of the unfair labor practice charges described above, the Region issued a report on objections and challenges and an order consolidating cases, complaint and notice of hearing. In this report, the Regional Director concluded that the allegations set forth in the unfair labor practice complaint were coextensive with the existing objections and it was ordered that the objections be consolidated with the outstanding complaint herein. The thrust of the complaint is that by engaging in threats, interrogations, promises of benefit, etc., alleged to be violations of Section 8(a)(1) and by discriminatorily assigning employees arduous job tasks and discharging employees, alleged as violations of Section 8(a)(3), Respondent has precluded the holding of a fair rerun election, and has thereby violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union.

[1] All dates are 1982 unless otherwise indicated.

Briefs were filled by counsel for the General Counsel, counsel for the Charging Party, and counsel for Respondent. Based on a consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

A. *Jurisdiction*

At all times material herein, Respondent has maintained its principle office and place of business in Ronkonkoma, Long Island, in the State of New York where it is, and has been at all times material engaged in the manufacture and installation of ornamental iron products. During the calendar year 1981, which period is representative of its annual operations generally, Respondent in the course and conduct of its business operation purchased and caused to be transported and delivered to its Ronkonkoma facility, iron, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to it, and which were received from other enterprises, including, inter alia, Morgan Steel Corporation located in the State of New York, each of which enterprises has received the said goods and materials in interstate commerce directly from State of the United States other than the State in which said enterprise is located. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[2]

B. *Labor Organization*

Respondent admits, and I find that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

C. *The Appropriate Unit*

In the petition filed by the Union in Case 29–RC–5791, the parties entered into a Stipulation for Certification Upon Consent Election approved by the Regional Director in a unit consisting of "all full time all office clerical employees . . . employed by Respondent . . . excluding all office clerical employees professional employees, guards and supervisors as defined in the Act." Respondent admits and I find the above unit is an appropriate unit within the meaning of Section 9(b) of the Act.

The parties further stipulated that as of October 1, Respondent employed five employees in the above unit. These five employees were Francisco Casaine, Michael Teskowich, James Dashner, Victor Buono, and Tim Clark.

D. *The State of Dennis and Joseph Marchese*

The testimony of Anthony Marchese established that the sole share-holders, officers, and directors of Respondent are Dennis and Anthony Marchese. In Dennis Marchese's capacity as a corporate officer and director, he has authority to hire and fire employees, responsibly direct and assign work, and is in general, in charge of the day-to-day operations of Respondent facility. Joseph Marchese, the father of Dennis and Anthony is neither a shareholder, officer, or director of the corporation. He performs all the layout work for Respondent but receives no compensation for such work. The testimony of employees Casaine, Teskowich, and Dashner establish that Joseph Marchese does assign work to employees and checks their work. On one occasion in October 1982, Marchese granted employee Dashner time off for emergency leave. Additionally, Joseph Marchese rehired employee Casaine and Teskowich following their discharge by Dennis Marchese on October 2 and 3, respectively. He also told employee Dashner on several occasions that Respondent could not give him a promised raise because of the pending union campaign.

Under these circumstances, I conclude that Dennis and Joseph Marchese are agents of Respondent acting on their behalf. *Devine Foods*, 235 NLRB 190 (1978); *Superior Casting Co.*, 230 NLRB 1179 (1977); *Indian Head Lubricants*, 261 NLRB 12 (1982).

E. *The Union's Organizational Campaign*[3]

Antonio Schifano, business agent for the Union, testified that sometime during the last week in September, Frank Casaine telephoned the Union and questioned Union Representative Johnny Bell about union representation. Bell informed him that he would mail Casaine a supply of union authorization cards and instructed him to distribute the cards to the employees for them to fill out and sign. Additionally, a union meeting was scheduled for September 30.

Frank Casaine testified that shortly after his conversation with Bell, he received a supply of union authorization cards in the mail. He immediately read one of the cards, filled it out, and signed it. Casaine authenticated

[2] The complaint in this case originally alleged jurisdiction for the fiscal year ending July 1, 1982. Respondent denied in its answer the Board's jurisdiction on this basis. During the course of the hearing, counsel for the General Counsel moved to amend the complaint to set forth the jurisdictional period as "during the calendar year 1981." This motion was granted notwithstanding Respondent's counsel's objection to such amendment. Respondent thereafter admitted jurisdiction based on a calendar year period.

[3] The General Counsel called Union Representative Anthony Schifano and employees Francisco Casaine, Michael Teskowich, and James Dashner as witnesses. I was extremely impressed with their demeanor. Their testimony was most detailed, and quite candid and forthright. Moreover, their testimony on direct examination was consistent with their testimony on cross-examination. Their testimony established an intensive antiunion campaign encompassing extensive and varied allegations, described below. I do not believe they would have the imagination or inventiveness to fabricate such detailed and complex testimony. Respondent failed to call any witness to contradict the testimony of the General Counsel's witnesses as to all of the 8(a)(1) allegations alleged, or the 8(a)(3) allegations concerning the discriminatory discharge of Casaine and the discriminatory assignment of arduous work to Casaine and Teskowich. In this connection, Respondent's only witness could have been Dennis Marchese. Respondent counsel stated during the hearing that Dennis Marchese was unable to testify on the day of the hearing because he was ill. However, Respondent counsel did not request an adjournment so as to enable Dennis Marchese to testify at a later date.

I therefore credit the testimony of the General Counsel's witnesses concerning those allegations relating to and involving Dennis Marchese, which are described below.

his authorization card at the hearing. His card is dated September 29.

Casaine testified that on September 29 he gave employee Tim Clarke a union authorization card, and informed Clarke that the purpose of the card was to enable the Union to represent him. He observed Clark read the card, fill it out, and sign the card. Thereafter, Clarke turned over his signed authorization card to Casaine. Clarke's authorization card is dated September 29.

Casaine further testified that following distribution of the union card to Clarke, he distributed a card to employee Mike Teskowich. He told Teskowich the purpose of this card was to enable the Union to represent him. He observed Teskowich fill out, date, and sign the card, which Teskowich immediately returned to Casaine. Teskowich fully corroborates Casaine's testimony concerning his authorization card.

Still later on September 29, Casaine distributed to employee Jim Dashner, a union authorization card. He informed Dashner that the Union had mailed him these cards, and asked him if he cared to fill it out, Dashner took the card from Casaine and left. Dashner credibly testified that following his receipt of the card from Casaine, he read it over, fill it out, sign it and return it to Casaine on September 30.

Dashner's card is dated September 30.

Schifano testified that on September 30, in the evening, he and Union Representative John Bell met with employees Casaine, Teskowich, and Clarke in a local restaurant located about a mile from Respondent's facility. At that time Casaine handed Schifano the four signed and dated union authorization cards described above. Schifano thereafter informed the employees that based on the cards submitted to him, he would contact Respondent and ask them for recognition, and that if Respondent refused recognition, the Union would file a petition for an election with the National Labor Relations Board. During the remainder of the meeting, Shifano spoke to employees about the benefits the Union would attempt to obtain for the employees.

On October 1 at 10:30 a.m., Schifano arrived at Respondent's facility and introduced himself to Dennis Marchese, Respondent's president. He told Marchese that the Union represented a majority of his employees and demanded recognition. Dennis Marchese angrily told Schifano the Union would never get in, and with that picked up a 4-foot length of iron pipe. He advanced toward Schifano and told him that if he did not leave, he would get this, gesturing with the pipe, over his head. At this time employee James Dashner appeared at the office door. Dashner testified that he saw Marchese and Schifano and heard Marchese yell "Get out of here, I know who you are. Do you want the pipe." He continued yelling at Schifano, "Do you want the pipe." Several times. At the time of this incident, Dashner had not been introduced to Schifano. Schifano thereafter left Respondent's premises.

On October 1, following Schifano's visit, the Union sent Respondent a telegram which set forth as follows:

> This is to confirm the oral advice given to you this date, that Shopmen's Local Union No. 455 of the International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, has been designated by a majority of your production and maintenance employees as their collective bargaining agent. We are accordingly requesting a meeting with you for the purpose of negotiating an agreement. If you have any doubt of our majority status, we would be willing to submit the same to an impartial independent body without delay. Please call the undersigned on receipt of this telegram.

Shortly after Schifano left, Francisco Casaine testified that Dennis Marchese approached him and questioned him as to whether he had any ties with the Union. Casaine said that he did not. Marchese then stated that some goon from the Union had come in to see him and he chased him out with a pipe.

I conclude that by threatening a union representative with serious bodily injury in the presence of employees (Dashner) and that by informing employees (Casaine) of such conduct, Respondent violated Section 8(a)(1) of the Act. *Jay Dee Transportation*, 243 NLRB 638, 640 (1979).

I further conclude that Dennis Marchese's questioning of Casaine as to whether he had any ties with the Union, immediately following the Union's demand for recognition was an attempt to illicit information from Casaine concerning his views and activities relating to the Union's organizing campaign. I find such questioning clearly constituted coercive interrogation in violation of Section 8(a)(1) of the Act. *Packer Industries*, 228 NLRB 182, 184 (1977).

Casaine, Teskowich, and Dashner testified that sometime during the afternoon of October 2, Dennis Marchese assembled all production employees in the shop. Present with Dennis Marchese was his father Joseph and brother Anthony. Dennis then proceeded to read to the assembled employees, the Union's demand telegram described above. When he had completed reading the telegram, he asked the employees if they had signed anything with the Union. He told the employees that if they had, he would close the shop because he could not pay the union rates. He then asked the employees whether they were for the Union or against the Union. Teskowich replied that he would go with the Union because they had been good to him in the past. Dennis Marchese replied that he would have to talk to him about this later and see exactly where he stood. This ended the meeting.

I conclude that Marchese's questioning of the employees as to whether they had signed anything with the Union and whether they were for or against the Union, viewed in the context of this meeting and Respondent's course of conduct throughout the Union's campaign constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act. *Calcite Corp.*, 228 NLRB 1048, 1054 (1977). I also conclude that Marchese's statement that he would close the shop if the employees had signed union cards because he could not pay the Union's rates constitutes an unlawful threat in violation of Section 8(a)(1). *Byrd's Terrazzo & Tile Co.*, 227 NLRB 866 (1977).

The testimony of Dashner and Casaine establish that on October 2, sometime following the meeting described

above, Dennis Marchese called Casaine and Dashner to his office. In the office, he showed them a yellow pad that had a handwritten statement which stated to the effect that the employees were satisfied with conditions in the shop and did not want union representation. After the employees had read the contents, Marchese asked them to write their own letter renouncing the Union as their bargaining representative. He told them that he wanted such letters executed and signed immediately or it would be the end of their jobs.

I conclude that by demanding employees to renounce the Union, Respondent violated Section 8(a)(1) of the Act. *Providence Medical Center*, 243 NLRB 714, 715 (1979). I further conclude that by threatening them with a loss of their jobs unless such letters of renunciation were executed, Respondent additionally violated Section 8(a)(1) of the Act.

During this same discussion, Dennis Marchese showed Dashner and Casaine Blue Cross Blue Shield forms and said that the employees would be getting these cards to fill out. At that time Respondent provided no medical benefits for its employees. Anthony Marchese, the only witness called by Respondent, testified that sometime in late August or early September, prior to the union organization, he had made some inquiries about Blue Cross health insurance. However, as of the date of this hearing, Respondent had not implemented any health plan for its employees. Both Casaine and Dashner testified that neither Dennis nor Anthony Marchese had ever spoken to them about possible medical coverage before this. In view of the timing of the promise to grant health benefits, in view of the nature of Respondent's intense and extreme antiunion campaign described above and below, in view of the absence of any documentary evidence that Respondent had determined to initiate a plan prior to the union campaign, I find this conduct to be an unlawful promise of benefit in violation of Section 8(a)(1) of the Act. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

Immediately following this discussion, Casaine told Dennis Marchese that before he would sign a union renunciation letter, he wanted to speak with his daughter about it. Marchese replied that if Casaine did not sign it "right now," he should get out of his shop. Casaine immediately left Marchese's office and packed his personal tools. When they were packed, he located Anthony Marchese and asked him to check him out to make sure he was not taking any company tools. As Casaine was leaving the premises, Dennis Marchese stated, "He's the one, he must be the organizer." At this point Joseph Marchese, Dennis' father, asked Dennis Marchese to give Casaine another day to think about the letter, and if he did not sign it by then, he should do what he had to do. Anthony Marchese then told Casaine if he wanted a day to think about signing the letter he could have it. Casaine put back his tools and returned to work.

I conclude that by ordering Casaine out of the shop because of his refusal to sign a letter repudiating the Union as his bargaining representative, Marchese effectively discharged Casaine in violation of Section 8(a)(1) and (3) of the Act. It is clear to me, as it was to Casaine, that Marchese's statement "Get out of my shop," constituted a discharge and that such discharge was the direct result of Casaine's refusal to execute a letter renouncing the Union. Accordingly, I conclude that by such conduct Respondent discharged Casaine in violation of Section 8(a)(1) and (3) of the Act.[4]

The testimony of Dashner established that on the evening of October 2, Dennis Marchese visited Dashner at his home. Marchese spoke with Dashner about the days' events concerning the Union and during this conversation he told Dashner that Teskowich had expressed loyality to the Union and that he, Marchese, felt he was the Union's organizer. At this point he stated, "You know that's the end of Michael (Teskowich) no matter what; in the morning he will be gone." Marchese then told Dashner that rather than giving him a $2 raise he was promised when he was hired in June 1982, he was going to give him a $3 raise instead.

I conclude that the promise of the additional $1 raise initially made during the union campaign constitutes an unlawful promise of benefit in violation of Section 8(a)(1) of the Act. *Exchange Parts*, supra.

The testimony of Teskowich established that on October 3, Teskowich arrived at the shop about 7:30 in the morning, his usual starting time. Upon his arrival, Anthony Marchese came over to him and told him that Dennis wanted to see him in the office. Teskowich went to the office where Dennis Marchese was present. Marchese opened his checkbook and handed Teskowich a prewritten check for the pay he had earned thus far during the week. He handed the check to Teskowich and told him he could go on unemployment if he wanted. Teskowich left the shop without saying a word. Anthony Marchese testified that Teskowich was laid off because work was generally slow and there were not sufficient jobs available. I do not credit Marchese's testimony. Marchese offered no documentary proof as to the validity of Respondent economic defense. Moreover, I was entirely unimpressed with Marchese's demeanor. His testimony was frequently vague and evasive and unsupported by documents one would normally expect an employer to possess in connection with such defense.

I conclude that Teskowich was discharged for his membership in and activities on behalf of the Union. The facts establish that Teskowich was a union member, and that he informed Dennis Marchese of his activities on behalf of and his support of the Union during the employee meeting on October 2. Moreover, Marchese during his evening visit to the home of Dashner had informed Dashner that he believed Teskowich to be the union organizer and that he intended to fire him that morning because of such activity. The discharge of Teskowich the following morning, as predicted by Marchese, in the absence of any valid reason for such discharge clearly establishes in my opinion that such discharge was discriminatorily motivated and in violation of Section 8(a)(3).

[4] The complaint does not allege this incident as an unlawful discharge. However, Casaine's discharge is alleged, and the matter was fully litigated. In view of Casaine's immediate reinstatement, there would be no backpay liability in connection with this discharge.

The testimony of Dashner established that on October 3, shortly after Dashner reported to work, Dennis and Anthony Marchese asked him to report to the office. Once inside the office Dennis Marchese told Dashner that he had to sign a letter renouncing the Union. He asked Dashner to write the letter in his own writing and sign it. Dashner thereupon executed a renunciation letter renouncing the Union as his bargaining representative, and give it to Marchese.

Casaine testified that on October 3 he arrived at work with employee Vic Buono and was summoned to the office. At this time Dennis Marchese showed both employees the renunciation letter signed by Dashner and asked them to sign similar letters which they did.

I conclude that by demanding and obtaining from the three employees described above, letters renouncing the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act. *Providence Medical Center*, supra.

Teskowich, who had been discharged on October 3, testified that about October 8, he was advised by his wife that Respondent had called and requested he contact them. The next morning he called the plant and spoke to Dennis Marchese who asked him to come to the shop. Shortly thereafter he arrived at the office and met with Dennis, Anthony, and Joseph Marchese. Dennis Marchese showed Teskowich letters renouncing the Union signed by employees Jim Clark, Buono, and Casaine and told him he would like him to sign a similar letter. Teskowich refused to execute such letter, claiming he wanted to consult with his attorney first. Joseph Marchese asked Teskowich if he wanted his job back. Teskowich said he did. Joseph Marchese asked if he could report to work on Monday and Teskowich said he could if Respondent wanted him back. Joseph Marchese replied that the Respondent would take him back. On October 11, Teskowich reported back to work. Upon his return, Dennis Marchese questioned him as to whether he had contacted his attorney and was ready to sign the letter renouncing the Union. Teskowich told Marchese that he was unable to contact his attorney over the weekend. Marchese asked him to call his attorney now, from his office. Teskowich phoned his attorney from Marchese's office, and following a conversation with his attorney told Marchese that he would sign a letter renouncing the Union. He executed such letter and gave it to Marchese.

I conclude that the evidence establishes conclusively that Teskowich was rehired solely on the condition that he execute a letter renouncing the Union. I find such conduct violative of Section 8(a)(1) of the Act. *Providence Medical Center*, supra.

The testimony of Teskowich, Casaine, and Dashner establish that on October 12, Dennis Marchese assembled all employees in the shop. He told them that Respondent was going to provide the employees with medical coverage plus 1 week vacation after 1 year employment and 2 weeks after 2 years. He then passed out the Blue Cross Blue Shield forms to the employees and requested they fill out such forms. At the time of the Union's organizing campaign, Respondent provided no vacation benefits for its employees. Anthony Marchese testified that he informed employees Buono and Dashner at the time of their hire that they would get a 1-week vacation after 1 year; a 2-week vacation after 2 years; and a 4-week vacation after 5 years. Dashner, Casaine, and Teskowich testified that they were unaware of any vacation benefits provided by Respondent and were never informed of such benefits by Respondent. I credit employees Dashner, Teskowich, and Casaine. As set forth above, I found that the above employees credible witnesses. Moreover, their testimony is mutually corroborative. Further, as set forth above, I was unimpressed with the demeanor of Anthony Marchese. In view of the fact that the medical and vacation benefits were initially promised to employees during the union campaign, and absent any evidence that Respondent had plans to implement such benfits prior to the union campaign, and in view of the extensive and unlawful antiunion campaign waged by Respondent, I find the promise of such benefits to be a violation of Section 8(a)(1) of the Act. *Exchange Parts*, supra.

Dashner testified that on October 12, sometime during the afternoon, he went into the office to hand Dennis Marchese his Blue Cross card which he had filled out. At this time he asked Marchese when he would get the $3 wage increase he had been promised on October 2. Dennis Marchese told Dashner that he could not give him a raise at this time because of the Union. Joseph Marchese who was also present in the office affirmed Dennis' position. Dennis then stated that they would pay him a part of the promised raise by advancing him an expense check to cover certain noncovered personal truck expenses.

I conclude that the denial of benefits promised, although such benefits had been promised unlawfully in violation of Section 8(a)(1), constitute an additional violation of Section 8(a)(1) of the Act. I also conclude that the promise of benefits in violation of Section 8(a)(1) of the Act. *Exchange Parts*, supra.

Casaine and Teskowich testified that on October 18, when Casaine reported for work, Dennis Marchese ordered Casaine to to take the "L" brackets of Respondent's forklift and bring them to the front of the yard which was part of Respondent's facility. These "L" brackets weighed approximately 100 pounds each. Casaine got a dolly located in the yard used to transport heavy equipment from one location to another, and put the "L" brackets on the dolly. Marchese ordered him to remove the brackets from the dolly and bring them to the front of the yard by hand, a distance of 75 to 100 feet. Casaine did so, although he testified that the task was a strenuous one. It should be noted at this point that Casaine is 62 years of age. Following the completion of this task, Casaine and Teskowich were then ordered by Dennis Marchese to push a station wagon parked on the street outside the Respondent's parking lot into the lot. It appeared that one or more of the tires was flat. Casaine and Teskowich tried to push the car along the street and into Respondent's lot, but were unable to do so. Dennis Marchese then ordered two more employees to aid

Teskowich and Casaine.[5] The four employees were then able to push the station wagon onto Respondent's lot, to a location designated by Dennis Marchese. At that point, Marchese told the employees he wanted the station wagon moved to a different location in the lot, and the employees complied. However, Marchese was still not satisfied, and had the employees push the station wagon to several other locations before at last, he was satisfied. The employees then returned to work in the shop.

A few minutes later Dennis Marchese came into the shop and ordered Teskowich and Casaine to return to the yard. Marchese pointed to a large pile of 20-foot steel bars and told them that he wanted the pile moved from its present location and placed upon storage racks located in the shop. Casaine and Teskowich picked up one bar, each employee supporting one end of the bar, and were about to take it to the shop and store it when Marchese ordered them to pick up two bars at a time. They complied with this order, and picking up two 20-foot steel bars at a time, transported the bars to the storage racks. They returned to the pile and picked up two more bars. However, Dennis Marchese told them to pick up three bars instead. They complied with Marchese's order, picked up the three bars with difficulty, and placed them in the storage racks. They continued to pick up three bars at a time until the whole pile was transferred from the yard to the storage racks. When they had completed this task, Marchese told them that he had another job for them to do. He directed them to a similar pile of steel stock, also located in the yard, and ordered them to move the stock to another spot in the yard some 10 feet away. The employees proceeded to lift together, one piece at a time. However, Marchese ordered them to handle two at a time instead. They complied with Marchese's order and continued in this manner to transport the stock to its new location until the whole pile had been moved. When this job was completed Marchese ordered them to move the same pile to yet another location in the yard, and to pick up three pieces at a time while performing this task. They complied with Marchese's order and moved the stock to the new location picking up three pieces at a time until the entire stock had been relocated again.

When they had completed this task, Marchese then directed them to a large pile of 20-foot steel pipe approximately 1-1/4 inches in diameter and ordered them to move the pipe from the location in the yard to the storage racks in the shop. There were over 80 lengths of pipe. The employees picked up one pipe but Marchese directed them to handle two pipes at a time. They complied with this order and moved the pipe from the yard into the shop and placed it in the storage racks. When they returned to pick up their second load, Dennis told them to pick up three pipes at a time. They did so and moved the pipes in a similar manner to the storage racks in the shop. When they returned to the pile to pick up their third load, Marchese ordered them to pick up four pipes at a time. Once again they complied and placed the four pipes in the storage rack. They continued lifting four pipes at one time until they had lifted over 40 lengths of 20-foot pipe in this manner. At this point, Casaine, who as set forth above is 62 years old, told Marchese he could not lift anymore and complained his heart was pounding fast and he was afraid for his health. Marchese told him he was "an iron worker and he was supposed to be able to pick up pipe." He then asked Casaine if he was quitting. Casaine replied he was not quitting and replied he could pick up two pipes at one time, but not four. Marchese told him it was his shop and he decides how many to pick up. Casaine replied that he was worn out and simply could not do it. Marchese shouted at him that he was quitting and went into the shop where he shouted to all employees working there that Casaine was quitting and that he had refused to do as he had been ordered. Casine followed Marchese to the shop and told the employees he was not quitting, but that he physically was unable to do what Marchese had ordered him to do. Marchese replied, ". . . Frank you're out. Come in the office I'll give you your check." Casaine waited outside Marchese's office. A few moments later Marchese came out, gave Casaine his check and told him to "shove it up his ass." Shortly after Casaine left, Marchese saw Dashner in the office and stated to him, "What you think of that. I could have kept that pace up all day." He then stated to Dashner, "You heard Frank say he quit." Dashner replied that he had not and Dennis asked him whose side he was on.

Casaine and Teskowich testified that on other occasions when they had to move large quantities of steel, they were able to use a wagon, a dolly, or the forklift to aid them.

I conclude that Respondent discriminatorily discharged Casaine in violation of Section 8(a)(1) and (3) of the Act. The facts of this case establish that Teskowich and Casaine were the leading union advocates and that Marchese was well aware of this. The facts further establish that Respondent had discriminatorily discharged both Casaine and Teskowich several weeks ago as described above. The instant discriminatory discharge is further established by the nature of the work assignment on October 18, and the manner by which the employees were compelled to perform such assignment. In this respect, the employees were required to lift heavier and heavier loads until they could barely complete the task while being denied, without any reason, the use of mechanical aides usually available to them. The obvious objection of this sadistic treatment was to compel Teskowich and Casaine to quit their jobs. This is conclusively evidenced by Marchese's statement, when Casaine complained that he was unable to continue lifting four pipes at one time, that he (Casaine) was "quitting." When Casaine denied that he was quitting and volunteered to continue lifting two pipes at one time, Marchese told him he was "out." The discriminatory intent to force Casaine to quit is further evidenced by Marchese's statements to Dashner when he stated that he could have "kept up that pace all day"; and by his statement to Dashner asking whose side he was on, when Dashner stated that he had not heard Casaine state that he had quit. That the discharge was discriminatorily motivated

[5] There is no evidence on the record as to which additional employees were assigned.

is further evidenced by the extensive unfair labor practices described above and below, committed by Respondent. Accordingly, I conclude that Respondent discharged Casaine in violation of Section 8(a)(1) and (3) of the Act.

I also conclude, in view of the evidence which established that the employees had always been permitted to use mechanical aides to complete similar job tasks, that the assignment of such work to Teskowich and Casaine constituted a discriminatory assignment of more arduous work in violation of Section 8(a)(1) and (3) of the Act.

Dashner testified that sometime prior to the union campaign, he had requested a week off without pay beginning on October 25 and that Dennis Marchese had agreed to this. A few days before Dashner was scheduled to take the week off, Marchese told him that *now* he would have a paid week's vacation and when he returned he would get his $3 raise as promised on October 2. Marchese then cautioned Dashner not to "screw" him up when he returned from vacation and to "vote the right way" in the election scheduled for November 1. This statement by Marchese clearly establishes that the promise of benefits was for the purpose of influencing Dashner's vote in the election. Accordingly, I find the promise of a paid vacation and a raise in pay to be a violation of Section 8(a)(1) of the Act.

Dashner further testified that on November 1, following the Board election, he was present with Dennis Marchese in his office. At this time Marchese stated, "I know how Michael (Teskowich) and you voted because all the other votes were challenged, so I know you voted no and Mike voted yes."

I conclude that this statement created the impression that Respondent was surveilling employee conversations, meetings, and other union activities where union sentiments were discussed, and is a violation of Section 8(a)(1) of the Act.

Dashner also testified that on November 3 he was present in Respondent's office with Joseph and Dennis Marchese. He asked Joseph and Dennis Marchese about the $3 raise he had been promised in October. Dennis Marchese informed him that he could not give him a raise at this time because of the Union, but that they would give him extra expense checks for his truck. Dashner testified that subsequently he did receive several expense checks as promised. For the reasons set forth and described above, I conclude that the refusal to grant Dasher the raise as promised, constitutes a denial of benefits in violation of Section 8(a)(1) of the Act and granting of the expense checks, a grant of benefits in violation of Section 8(a)(1). *Exchange Parts*, supra.

F. *The 8(a)(5) Violation*

As set forth above, the evidence established that the Union obtained four valid authorization cards in an appropriate unit consisting of five employees. The only remaining issues to be decided is whether in view of the unfair labor practices committed, described above, a bargaining order is necessary.

The General Counsel contends that a bargaining order should issue pursuant to the rationale set forth in *NLRB v. Gissel Packing Co.*, 385 U.S. 575 (1969). In *Gissel*, the Supreme Court enumerated three categories of cases in determining the appropriateness of a bargaining order.

The first category includes those exceptional cases in which the employer has committed outrageous and pervasive unfair labor practices of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair election cannot be held. When these circumstances exist, a bargaining order may issue without inquiring into majority support.

The second category includes those cases in which the unfair labor practices are less pervasive than the first category, but where they nevertheless undermine majority strength and impede the election process. Under the second category of cases, the bargaining order may be appropriate where at one point the union had a majority status and where there is only a slight possibility of erasing the effects of past unfair labor practices and insuring a fair election by the use of traditional remedies.

The third category includes those cases where the unfair labor practices are not sufficiently pervasive to undermine majority strength and impede the election process, or where traditional Board remedies will best effectuate the purpose of the Act. In these circumstances, a bargaining order is not mandated.

I conclude that the unfair labor practices of the instant case fall within the first category described above. An analysis of the unfair labor practices committed by Respondent establishes conclusively that they were extensive, exceptional, outrageous, and pervasive; that they occurred in an exceptionally small unit numbering five employees, and took place over a short concentrated period of time of 1 month, beginning immediatley following the demand for recognition and continuing until after the election.

Thus, immediatley following the Union's demand for recognition, Respondent systematically interrogated its employees as to whether they signed cards for the Union and their sympathies on behalf of the Union, threatened to close the shop if the employees obtained union representation, discharged the two leading union supporters, required all employees to execute letters renouncing the Union under an implied threat of discharge for their failure to do so, and promised and granted various benefits.

It has long been established that such similar unfair labor practices are likely to have a lasting and inhibitive effect on a substantial percentage of the work force and therefore are considered "hallmark" violations which support the issuance of a bargaining order. *United Dairy Farmers Assn.*, 257 NLRB 772 (1981); *Highland Plastics*, 256 NLRB 146 (1981).

During the course of this hearing, Respondent attempted to introduce evidence establishing substantial employee turnover since the commission of the unfair labor practices described above. Respondent contends that in this connection, the Second Circuit case, *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (1980), is applicable. Such evidence of turnover was rejected by me.

The Board has consistently held that the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were com-

mitted and, therefore, to delete such order on the basis of employee turnover would reward, rather than deter, an employer who engaged in unlawful conduct during an organizational campaign. Accordingly, I conclude that a bargaining order is justified in view of the serious unfair labor practices described above. See *Highland Plastics*, supra, and cases cited therein.

G. *The November 1 Election*

On November 1, 1982, an election was conducted in Case 29-RC-5791. The tally of ballots indicated an inconclusive result; the challenged ballots being sufficient in number to affect the results of the election. Timely objections and challenges were filed by the Union.[6] In view of my findings set forth above, that Respondent has violated Section 8(a)(1) and (3) of the Act in the manner described above, all of these unfair labor practices taking place between the filing of the petition on October 1 and the election which was held on November 1, I therefore conclude that these unfair labor practices are more than sufficient to warrant setting aside the election. Accordingly, I sustain the Union's objections to the extent consistent with the unfair labor practices found herein and recommend the election be set aside.

CONCLUSIONS OF LAW

1. Respondent MMIC, Inc. d/b/a Marchese Metal is, and has been at all times material herein, an employer engaged in commerce within the meaning of the Act.

2. Shopmen's Local Union 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time production and maintenance employees employed by Respondent at its Lakeland Avenue, Ronkonkoma, New York facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. At all times since October 1, 1982, the Union has been the exclusive representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By threatening union organizers in the presence of employees with physical bodily harm, Respondent has violated Section 8(a)(1).

6. By interrogating its employees concerning their membership in or activities on behalf of the Union, Respondent has violated Section 8(a)(1) of the Act.

7. By threatening to close its plant if the Union was selected by the employees as their collective-bargaining representative, Respondent has violated Section 8(a)(1) of the Act.

8. By threatening to discharge its employees because of their membership in or activities on behalf of the Union, Respondent has violated Section 8(a)(1) of the Act.

9. By coercing its employees to execute letters renouncing the Union as their collective-bargaining representative, Respondent has violated Section 8(a)(1) of the Act.

10. By promising its employees medical, vacation, and wage increases to induce them to renounce their membership in, and cease their activities on behalf of the Union and to influence their vote in a union election, Respondent has violated Section 8(a)(1) of the Act.

11. By granting vacation benefits and wage increases to its employees in order to induce employees to renounce their union membership and cease their activities on behalf of the Union and in order to influence their vote in connection with the election, Respondent has violated Section 8(a)(1) of the Act.

12. By denial to its employees of promised wage increases, Respondent has violated Section 8(a)(1) of the Act.

13. By assigning its employees Michael Teskowich and Francisco Casaine to more arduous and less agreeable job tasks because of their membership in and activities on behalf of the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

14. By discharging its employees Michael Teskowich and Francisco Casaine because of their membership in and activities on behalf of the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

15. By refusing, since on and after October 1, 1982, to recognize and bargain collectively with the Union as the exclusive representative of the employees in the unit described above, Respondent has violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that Respondent has engaged in various unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Since I have found that Respondent discriminatorily discharged Francisco Casaine on October 18, 1982, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former job, or, if it no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges.

I shall recommend that Respondent make whole Francisco Casaine and Michael Teskowich for any loss of earnings they may have suffered by reason of the discrimination against them from the date of their termination until the dates of their reinstatement.[7]

Backpay for the above employees shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

I shall also recommend that Respondent expunge from its records any reference to the unlawful discharges of Francisco Casaine and Michael Teskowich, to provide

[6] Case 29-RC-5791.

[7] As set forth above, Michael Teskowich, who was discriminatorily discharged by Respondent on October 3, was reinstated to his former job on October 11 without loss of seniority or other rights and privileges.

written notice of such expunction to Casaine and Teskowich, and to inform them that Respondent's unlawful conduct will not be used as a basis for further personnel actions concerning them. *Sterling Sugars*, 261 NLRB 472 (1982).

I shall further recommend that Respondent be ordered to recognize and bargain with the Union as the exclusive collective-bargaining agent of the employees in the unit found appropriate herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, MMIC, Inc. d/b/a Marchese Metal, Ronkonkoma, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Threatening representatives of Shopmen's Local 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO, herein called the Union, with bodily injury in the presence of employees.

(b) Interrogating employees concerning their membership in or activities on behalf of the Union.

(c) Threatening to close its shop if the Union is selected as collective-bargaining representative by its employees.

(d) Threatening to discharge employees because of their membership in or activities on behalf of the Union.

(e) Coercing its employees to renounce their membership in the Union.

(f) Promising its employees various benefits, including medical coverage, wage increases, and paid vacations in order to induce them to abandon membership in the Union or cease activities on its behalf or to induce their vote in any NLRB election.

(g) Granting of wage increases in order to induce its employees to abandon their membership in the Union or their activities on its behalf or to induce their favorable vote in an NLRB election.

(h) Denying its employees wage increases or other benefits previously promised to them because of their membership in or activities on behalf of the Union.

(i) Assigning its employees to more arduous and less agreeable job tasks because of their membership in and activities on behalf of the Union.

(j) Discouraging membership in or activities on behalf of the Union or any other labor organization by discharging employees, by assigning them more arduous work, or otherwise discriminating against them in their hire or tenure.

(k) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of all its full-time production and maintenance employees at its Ronkonkoma, New York location, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(l) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer to Francisco Casaine full and immediate reinstatement to his former or substantially equivalent position of employment, without prejudice to his seniority or to other rights and privileges previously enjoyed.

(b) Make whole Michael Teskowich and Francisco Casaine for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section entitled "The Remedy."

(c) Recognize and, on request, bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit described above with respect to wages, rates of pay, hours of employment and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analysis of the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Ronkonkoma, New York, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."